No. 14982

United States Court of Appeals

For the Ninth Circuit

R. P. Hill and Mary Hill, *Appellants,*

vs.

A. E. Waxberg, doing business as Waxberg Construction Company, *Appellee.*

Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF OF APPELLANTS

Landon & Aiken,
355 Olympic National Building,
Seattle 4, Washington.

George B. McNabb, Jr.,
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Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF OF APPELLANTS

PLEADINGS AND FACTS

This appeal follows a trial before a jury, in an action brought by A. E. Waxberg, the respondent, against the appellants, R. P. Hill and Mary Hill, his wife. The first complaint served by the respondent was not filed and is not contained within the transcript on this appeal. The plaintiff served and filed a second amended complaint containing three causes of action (Tr. 3-11). He alleged in the first cause of action that on or about the 16th day of January, 1950, plaintiff and defendant entered into an oral contract whereby plaintiff agreed to construct a building under Section 608 of the Federal Housing Authority Act, and that plaintiff, in accordance with said oral contract, agreed to construct said building for the defendants at the cost of $1,694,374.00. Plaintiff alleged a breach of this contract by the defendants and sought damages for $50,826.00 as a reasonable contractor's profit. In his second cause of

action and, as an alternative cause of action or remedy, he alleged an oral agreement whereby the plaintiff was to construct a building for the defendants and went on to allege that in connection with said agreement he had incurred certain expenses and had rendered certain services for which he sought reimbursement in the total sum of $6,583.15. For his third cause of action he incorporated the allegations of the first and second cause of action and asked, as an alternative recovery, for the reasonable value of his services to the defendants, together with his expenses of $2,283.15.

The defendants in answer to the second amended complaint denied that a contract had ever existed between the parties; alleged that the defendants had made no request to the plaintiff to perform any services or expend any money; that plaintiff performed no services of value to the defendants; that any expenditures of time or money by the plaintiff were normal incidents of the contracting business as preliminary to or in an effort to secure a contract for the construction of a building; that as a condition to performing any agreement between defendants and plaintiff, plaintiff was to secure a contractor's bond which he was unable to do. The defendants denied the remaining allegations of the second amended complaint (Tr. 11-16).

At the close of the plaintiff's case the trial judge granted the defendants a directed verdict as to the first cause of action contained in plaintiff's second amended complaint (Tr. 181) and gave to the plaintiff the option of proceeding on either the second or third cause of action (Tr. 182). Plaintiff elected to proceed on the third cause of action (Tr. 182).

Prior to the putting on of the defendants' case the plaintiff moved for leave to file a third amended complaint, and this was granted by the court (Tr. 203). In his third amended complaint, plaintiff alleged that the parties had agreed that plaintiff was to construct a building, if and when an FHA commitment was secured and after necessary plans and specifications were prepared to determine the cost of construction; that at the request of the defendants, plaintiff performed certain services and incurred certain expenses in connection with the application to the FHA; that after the issuance of the FHA commitment defendants demanded that plaintiff pay to them $50,000.00 of the expected builder's profit for constructing said building, and upon plaintiff's refusal to do so, defendants severed their association with plaintiff; that, by reason of the transactions between the parties and by virtue of defendants failing to make a contract with plaintiff for a specified sum to construct the building for them, an implied contract existed to pay plaintiff for the reasonable value of his services and expenditures in connection with the FHA commitment. The plaintiff prayed for a recovery from the defendants in *quantum meruit* for the reasonable value of his services and expenditures for the defendants' benefit (Tr. 17-20).

At the close of the trial the District Court dismissed the defendant, Mary Hill, from the action (Tr. 362). A verdict was rendered in favor of the plaintiff against the defendant, R. P. Hill, and judgment was entered thereon (No. 6481) (Tr. 25). After motions by the defendant to set aside the verdict and/or for a new trial

were denied by the court, notice of appeal was filed by the defendants (Tr. 28).

JURISDICTION

Jurisdiction of the district court rests on the act of June 6, 1900, 31 Stat. 322, as amended, 48 U.S.C. 101. The jurisdiction of this honorable court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This litigation arises out of a transaction wherein an apartment building was to be constructed in Fairbanks, Alaska. The respondent, A. E. Waxberg (plaintiff) was a building contractor residing in Fairbanks. During December, 1949, conversations took place between the appellant and respondent(Tr. 43), and as a result the respondent became a co-sponsor with the appellant and the appellant's wife in an application to the Federal Housing Authority. This application was to be submitted under Section 608 of the Federal Housing Authority Act, for a commitment to insure a loan. The loan was to be used to finance the construction of the apartment building. The building was to be constructed upon certain real property owned by the appellant; the property being located within the City of Fairbanks between First and Second Streets and fronting upon Lacey Street.

Mr. Waxberg testified that, as a result of the conversations occurring between himself and Mr. Hill, he understood that he was going to be the builder or contractor in the event that a commitment was received from the FHA (Tr. 45). There was never a written agreement between the parties.

The respondent testified that he performed or caused to be performed certain services in connection with the application for the commitment. He testified that he worked with architect Chiarelli & Kirk, hired by Mr. Hill to aid in preparing the documents necessary for submission with the application (Tr. 47 and 48); that he caused certain preliminary drilling to be done on the property upon which the building was to be constructed (Tr. 47), and that he made three or four trips to Seattle. In this connection he testified as follows (Tr. 49):

> "Q. You spoke of having gone to Seattle. Do you recall the number of trips, if there were more than one, that you made to Seattle in connection with this building project?
>
> A. I made three or four trips.
>
> Q. What was the principal purpose of your making these trips?
>
> A. Mostly in discussing the construction of the building with Hill and the design of the building with the architects and also helping with getting an estimate up to present to the F.H.A."

Mr. Waxberg described the purpose of his activities in the following testimony (Tr. 125):

> "Q. And in the event that, let me ask you this, is it your statement that the FHA absolutely guarantees a builder a profit of six per cent of the construction cost?
>
> A. They don't absolutely guarantee it. It is allowed the builder and on the application and the breakdown of the cost and so forth it is set up. It is set up so much for the architect. He gets his fee and the contractor gets his.

Q. What you mean by that is that those amounts are allowable?

A. They are allowable, yes.

Q. But they are not guaranteed, are they?

A. No, they are not guaranteed, no.

Q. Fact of the matter is, when they make a commitment of this type it is to agree to guarantee a loan for construction?

A. That's right.

Q. And if you can't build the building for any less than that or if it costs that much without any profit, that is too bad, isn't it?

A. That's right. *That is the reason I spent all this time to see that we get a building the specifications and so forth that, so that I could make a reasonable profit.*

Q. Or at least make a profit, be able to construct a building?

A. Be able to construct the building and make a profit and we worked to the point of six per cent.

Q. Up to the time that these plans were submitted to the FHA there wasn't any price established, there wasn't any agreement, you were just trying to get something together that the FHA would loan money on, weren't you?

A. That's right."

Another witness, a Mr. Glenn Sumter of Seattle, Washington, called by the appellant, testified that his organization, a mortgage company, prepared the application for the FHA commitment (Tr. 215). This party also testified that the necessary preliminary drawings, or architectural exhibits, were obtained from the architectural firm of Chiarelli & Kirk (Tr. 216), the firm employed by Mr. Hill.

The application for the FHA commitment was submitted by Mr. Sumter (Tr. 215, 225), during the month of February, 1950.

The application was for a total construction cost of $1,782,000.00. The FHA regulations provided that certain percentage fees would be allowed the builder, architects and others. Under the regulations the FHA could not guarantee a loan in excess of 90% of the "replacement cost" of the projection (Tr. 220). The appellant lacked the necessary capital to make up the remaining 10% of the replacement cost. For this reason the application indicated that Mr. Waxberg would not withdraw $45,000.00 of his fee as a builder (5% or 6% of the construction cost) (Tr. 68, 222, 223).

The FHA commitment was isued during the latter part of February, 1950 (Tr. 230), in the amount of $1,694,200.00. This meant that a mortgage would be insured up to this maximum figure (Tr. 231).

Only general preliminary plans or drawings were submitted with the application to the FHA and at the time of the issuance of the commitment no exact cost figures or working plans or drawings had been prepared (Tr. 53, 54).

Shortly after the issuance of the commitment the appellant and respondent became unable to agree to the terms under which they would be associated in the construction of the building. Mr. Hill testified that while the commitment price was for $1,694,200.00 this figure, less certain expenses such as architectural fees, would reduce the amount available for the construction cost to about $1,500,000.00 (Tr. 301, 302). Mr. Hill

described his conversation with Mr. Waxberg in the following manner (Tr. 303, 304):

"Q. Did you discuss that matter with Mr. Waxberg in the New Washington Hotel?

A. I did.

Q. What was the extent of your conversation in that regard?

A. That that was all the money there was available for a contract was a million five hundred.

Q. What did he say in that regard?

A. That the commitment was for a million six hundred ninety-four thousand and he demanded that amount for the contract.

Q. Mr. Hill, could you possibly have given him that amount of money?

A. I know of no way in which I could have raised the amount of money to give him that amount.

Q. It was not available from the loan, was it?

A. No. (291)

Q. Did you ever agree to give him that amount of money?

A. No.

Q. What did Mr. Waxberg say then?

A. He said that he could not build and could not enter into a contract for anything less than the full commitment price.

Q. Did he make you at that time any counter-proposals?

A. I wouldn't call it a counter-proposal. There was more to his proposal.

Q. What did he say?

A. That if I would issue him fifty-one per cent of the stock in the corporation, give Mr. Orsini the

management contract then that he could sell stock and some of the remaining stock to raise this money.

Q. On that condition he would build the building?

A. On that condition he would build the building.

Q. Was that proposal acceptable to you, Mr. Hill ?

A. No. May I enlarge on that?''

Mr. Waxberg on the other hand testified that after the commitment was issued and during a conversation between himself and the appellant held in Seattle, Mr. Hill made a proposal to him (Tr. 53, 54):

''Q. In substance, what was, did Mr. Hill make a proposal to you concerning some money to be returned?

A. Yes, it was fifty thousand dollars is what another contractor had offered Mr. Hill as a kickback and that was put to me that I should do that or else the thing would be off.

Q. If I understand you right, in other words, of the FHA money that was coming on the job fifty thousand dollars that would go to you would be paid over instead to Mr. Hill?

A. That's right, paid over to Mr. Hill instead of me. You see the FHA allows a certain amount, certain interest rate for a contractor's fee and I didn't know at the time because the plans had never been completed. All we had was preliminary drawings. Just enough to get the FHA commitment is all we had, preliminary drawings. It would be impossible for me to know whether there is ten thousand, five thousand or a hundred thousand dollars profit. It is the idea of getting the building

built. And I knew I was safe up to as far as within fifty thousand dollars at least (24). Well, when the demand is made that I kick back fifty thousand dollars, I couldn't see it. There is where . . . (interrupted)

Q. You refused Mr. Hill's proposal of giving him fifty thousand dollars out of the money that FHA designates to you as a builder?

A. That's right."

Each party, therefore, related a different version as to why they did not become associated in the construction of the building after the issuance of the FHA commitment.

Mr. Sumter testified that a revised or amended commitment was issued by the Federal Housing Authority approximately one year after the issuance of the original commitment, and a building known as the Polaris Building was constructed. Mr. Waxberg was not listed as a sponsor on this revised commitment. The building constructed was an apartment building but differed substantially in general design from the building originally planned (Tr. 124).

At the conclusion of all the evidence, appellant moved for a directed verdict in its favor, which motion was denied (Tr. 364).

The jury returned a verdict in the sum of $11,067.46 against this appellant (Tr. 22).

SPECIFICATION OF ERRORS

The District Court erred in:

1. Overruling defendants' motion for a directed verdict at the close of the plaintiff's evidence.

2. Granting leave to the plaintiff for the filing of an Amended Complaint subsequent to the defendants' motion for a directed verdict.

3. Refusing defendants' motion for a directed verdict at the close of the case.

4. Refusing to give the Defendants' Requested Instructions No. 1, 2, 4 and 5, reading as follows (Tr. 20-22):

a. Defendants' Requested Instruction No. 1.

> "You are hereby instructed that the plaintiff is not entitled to a recovery against the defendants in any amount, if he performed services or expended money for the purpose of obtaining business through a hoped-for contract."

b. Defendants' Requested Instruction No. 2.

> "If, in this case, you find that the services rendered by the plaintiff or the monies expended by him were as much in his interest or for his benefit as in the interest or for the benefit of the defendants, and were rendered and expended for the purpose of securing a commitment for insurance, and at the time that such services were rendered or monies were expended that the plaintiff had no expectation of charging therefor then, and in that event, you must find for the defendants and against the plaintiff."

c. Defendants' Requested Instruction No. 4.

> "If you the jury believe that the plaintiff

rendered services or expended monies without an expectation of compensation from these defendants, you must find for the defendants and against the plaintiff."

d. Defendants' Requested Instruction No. 5.

"In this case, to find in favor of the plaintiff and against the defendants, you must be convinced by a preponderance of the evidence that, at the time the plaintiff rendered services or expended money, he then expected these defendants to pay him therefor, and that the services were rendered by the plaintiff and received by the defendants under such circumstances as to cause the defendants to expect that they were to pay therefor."

5. Entering judgment upon the verdict of the jury, which was contrary to the evidence.

6. Entering judgment upon the verdict of the jury, which was excessive in amount.

7. Entering judgment upon the verdict of the jury when there was insufficient evidence to justify the verdict.

8. Refusing to grant the defendants a continuance after allowing plaintiff to file an amended complaint.

9. Entering judgment upon the verdict of the jury when the amount of the verdict was influenced by passion and prejudice against the defendants and was an excessive verdict.

10. Overruling defendants' motion for judgment notwithstanding the verdict or for a new trial.

11. Giving its Instruction No. 3 to the jury, which reads as follows:

"It appears from the evidence that plaintiff and defendant, R. P. Hill, undertook as co-sponsors to obtain from the Federal Housing Administration a commitment for a loan with the understanding that, should the commitment be granted, the plaintiff was to build a building for the defendant. It also appears from the evidence that the commitment sought by the parties was granted, and that because of a disagreement between the parties the plaintiff did not build the building for which this commitment was obtained.

"It is the contention of the plaintiff that his failure to build the building was the fault of the defendant, and it is the contention of the defendant that the failure of the plaintiff to build the building was the fault of the plaintiff. It is for you to determine from all of the evidence who was actually at fault.

"If you should find from a preponderance of the evidence that the defendant was at fault, that both parties were equally at fault, or that neither was at fault, you will return a verdict in favor of the plaintiff, and if you do not so find you will return a verdict in favor of the defendant.

"If you find in favor of the plaintiff you will return a verdict in favor of the plaintiff for the value of the benefit which the defendant received as a result of the plaintiff's services and expenditures."

Appellant excepted to the giving of this instruction for the reason that it was not in accordance with the law governing the case, the theory of the instruction resting upon breach of contract when the evidence indicated that there was no contract between the parties (Tr. 369, 378).

ARGUMENT

I. The Evidence was Insufficient to Establish a Case For the Jury

Appellant will discuss together Specification of Errors 1, 3, 5, 7 and 10, relating to the question of whether the evidence was sufficient to establish a case for the jury.

The trial court directed a verdict against the plaintiff as to the cause of action in the second amended complaint based upon an express contract (Tr. 181). The court also should have directed a verdict against the plaintiff as to the cause of action presented in the third amended complaint. The evidence was insufficient to establish a case for the jury as to an implied contract or *quantum meruit*.

The respondent repeatedly testified that in performing his services relating to the application for the commitment, he expected no compensation from the appellant. By his own admission he was unable to establish a necessary element to recover upon an implied contract. Mr. Waxberg testified that (Tr. 282):

> "Q. (By Mr. McNabb): I say, at the time that you were working on this project did you intend to charge Mr. Hill for that work?
>
> A. Well, not with the mutual agreement that we had, if the commitment was to go through, if the commitment went through I was to build the building and I had no intentions to be, I never even dreamed of getting kicked out of the deal. That is the bad part of it. If I had ever thought of that I would have had a written contract before we started, before I ever spent five minutes on it I would have had a written contract."

As further proof of the respondent's intent at the time of rendering these services and incurring the expenditures, the following rather lengthy quotation is extracted from his testimony (Tr. 144, 145, 146):

"Q. Al, you worked with Chiarelli and Kirk and were in Seattle on these various trips, the monies that you expended and the time that you consumed, you were supposed to have been paid for that from your normal builder's profit, were you not?

A. Well, that is a different deal. I can bid on jobs and never get the money as far as that goes, and that is expense that I have to stand. It is part of my business.

Q. *I say though, in this instance you were supposed to recover your costs for these trips to Seattle and the time that you spent with Chiarelli and Kirk and the like from the profit, from your builder's profit on this thing, were you not?*

A. *Well, yes, I expected to when the building was done why I would be.*

Q. *That is where you were to be repaid for any monies that you expended?*

A. *That's right.*

* * *

(Tr. 147, 148)

Q. And there wasn't any agreement on Rudy's part to pay you for those expenses other than as it came back to you out of the building?

A. No, there was no agreement that I was going to be kicked out of there either after the commitment was made.

Q. But that is the way you were supposed to get this money back, wasn't it?

A. Well, yeah.

Q. From the building?

A. That's right."

He again reaffirmed the statement that he had not expected any compensation from Mr. Hill at the time he performed the services in other parts of his testimony (Tr. 283).

An essential element of recovery upon implied contract or *quantum meruit* is the performance of services with the expectation of payment. We find the doctrine stated in the following manner in the annotation at 54 A.L.R. 548, 550, Services-Implied Agreement Repelled:

> " . . . it is equally true that when services are rendered without expectation of compensation on the part of the one rendering the service, or of an obligation to pay on the part of one receiving the benefit, no contract or agreement to pay is implied." *Hammond v. Consolidated Rendering Co.,* 125 Me. 491, 135 Atl. 197 (1926); *Carey Lithograph Co. v. Magazine & Book Co.,* 70 Misc. 54, 27 N.Y. Supp. 300 (1911).

The decision of *Baker & Company v. Ballantine & Sons,* 127 Conn. 680, 20 Atl. 2d 82 (1911), involved a problem quite similar to the one at bar. There the plaintiff had made certain expenditures in reliance upon obtaining an exclusive agency for the sale of the defendant's products. The jury had returned a verdict for the plaintiff for the reasonable value of services rendered. The court there stated (page 84):

> " . . . we point out that the plaintiff could not recover the expenditures which it made in pursuance of the agency upon the basis of an implied contract. The plaintiff evidently looked for its

> compensation to the profits which would accrue to it from the sale of liquor supplied by the defendant; and it appears that in Baker's own testimony that he talked to Healy about certain advertisements he was doing and the latter stated that the defendant would not pay for that. There was lacking the elements necessary to give rise to an implied contract, that services were rendered by the plaintiff in the expectation that the defendant would pay it for them and were accepted by the defendant with knowledge of that expectation."

Clearly Mr. Waxberg did not expect any personal obligation on the part of Mr. Hill for the services in connection with the application. The possibility of his becoming the builder under the construction contract was sufficiently attractive that he performed certain services with the intention of obtaining reimbursement as a builder under the construction contract (Tr. 283).

Since at the time of performing these services the respondent expected no personal obligation on the part of the appellant, he cannot, as an afterthought, assert a claim in *quantum meruit*. The reasoning of the court in *Baker & Co. v. Ballantine & Sons,* 127 Conn. 680, 20 Atl. 2d 82, *supra,* is fully applicable to this situation in denying the plaintiff a cause of action in implied contract or *quantum meruit*. See also *Brightman v. Oglethorp Telephone Co.,* 47 Geo. 521, 171 S.E. 162 (1933).

Appellant suggests that the following language from a decision of this court, *State of Washington v. United States* (9 Cir., 1954) 214 F.2d 33, sets forth the standard or test under which the trial court should have directed a verdict in favor of the defendants (214 F.2d 33, 40, 41):

"Where there is substantial evidence on both sides of an issue, the court is not free to re-weigh the evidence and substitute its inference or conclusions for that of the jury. *Tennant v. Peoria & P. U. Ry. Co.,* 1944, 321 U.S. 29, 64 S.Ct. 409, 88 L.ed. 520; *Butte Copper & Zinc Co. v. Amerman,* 9 Cir., 1946, 157 F.2d 457. However, in making the primary determination as to whether or not there is substantial evidence, a district judge is not a 'mere automation.' *Gunning v. Cooley,* 1930, 281 U.S. 90, 93, 50 S.Ct. 231, 74 L.ed. 720; *United States v. Burke,* 9 Cir., 1931, 50 F.(2d) 653, 657. He must determine 'not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it.' *Improvement Co. v. Munson,* 1871, 14 Wall, 442, 448; *Butte Copper & Zinc Co. v. Amerman, supra,* 157 F.2d at page 458.

"The crux of the matter is whether there is substantial evidence to support the verdict."

For the reasons which this appellant has discussed in the foregoing argument, there was no substantial evidence establishing the elements of an implied contract or *quantum meruit.* The trial court should have directed a verdict for the defendants.

II. The Court Erred in Refusing to Give Each of the Defendant's Requested Instructions

It was the respondent's theory, as set forth in his third amended complaint, that the appellant was liable in *quantum meruit* for the reasonable value of his services and expenditures. The court had dismissed respondent's cause of action on express contract at the close of the respondent's case.

However, the instructions given by the court do not embody the respondent's theory. Appellants' counsel excepted to the giving of the court's Instruction Number Three for the reason that it was based upon the theory of breach of contract (Tr. 369, 378).

As appellant has previously suggested, an essential element of *quantum meruit* is the performance of services with the expectation of payment (See *Curran v. Smith* (1906 Cir.) 149 Fed. 945 and *Western Oil Refining Co. v. Underwood,* 83 Ind. App. 488, 149 N.E. 85 (1925); annotation 54 A.L.R. 548, Services-Implied Agreement Repelled.

Appellants' Requested Instructions Number 1, 2, 4 and 5, quoted verbatim in appellants' Specification of Errors herein, set forth the principles that services must be rendered with the expectation of compensation to be received from the one obtaining the benefit of these services. See 54 A.L.R. 548, 554, Services-Implied Agreement Repelled, wherein it is stated:

> "Before a request for, or acceptance of, services on the part of the beneficiary will imply an intent on his part to pay therefor, it must appear that the services were rendered under such circumstances that it may be fairly inferred that it was the intent of the party rendering them that the beneficiary should pay."

Appellants' Requested Instructions Number 1, 2, 4 and 5 correctly stated the law applicable to the case. The instructions correctly define the issues presented and should have been submitted to the jury.

The respondent stated repeatedly that at the time of performing the services, even assuming that they were

an aid in obtaining the commitment, he did not expect compensation from the appellant. The court erred in failing to give appellant's requested Instructions Number 1, 2, 4 and 5.

III. The Court Erred in its Instructions to the Jury

The court's Instruction Number Three removes from the jury any question as to the finding of an implied contract or the elements of *quantum meruit.* The only issue left to the jury was the question of fault as to why the building was not constructed.

There was no opportunity for the jury to consider the question of the intent of the parties relating to the obligation that should arise from the performance of certain services by the respondent. In view of the evidence produced in the trial of the case such an instruction was erroneous.

The court's Instruction Number Three also stated that the respondent was entitled to recover even though both parties were at fault in preventing the construction of the building. Even under the theory apparently adopted by this instruction it is submitted that this portion of the instruction is not a correct statement of the law. In this connection see American Jurisprudence, Building and Construction Contracts, Section 44, wherein it is stated:

> "The general rule that where a party has partially, but not substantially performed his promise contained in an entire contract, and the failure to perform the balance of the contract is not excused, no recovery can be had on the contract or upon a *quantum meruit* applies to building and construction contracts."

IV. The Verdict of the Jury Was Excessive in Amount

The appellant will discuss together Specification of Errors Number 6 and 9, relating to its contention that the verdict of the jury was excessive.

The trial court instructed the jury that if it found for the plaintiff a verdict should be returned "for the value of the benefit which the defendant received as a result of the plaintiff's services and expenditures" (Tr. 373, Court's Instruction Number 3).

The services rendered by the respondent were for the most part, if not entirely, incidental to the application for the FHA commitment (Tr. 49, 50).

The only testimony produced by the respondent as to the reasonable value of his services *to the appellant* is contained on page 73 of the transcript. The respondent there stated:

> "Q. (By Mr. Hepp): Can you state the reasonable value, Mr. Waxberg, of your services to Mr. Hill in connection with the preliminary surveys, all that work that you did which he profited by, if any, up to the point of FHA commitment?
>
> Mr. McNabb: Object to that as being not the best evidence, calling for a conclusion.
>
> The Court: He may answer.
>
> Mr. Waxberg: Well, yes, I feel that I lost out in many ways by spending my time on this particular project.
>
> Q. (By Mr. Hepp): We are now talking about the value of services to Mr. Hill as set forth in your third cause?
>
> A. Well, it is certainly worth a hundred dollars a day for my time that I spent on it.

Q. How many days did you spend?
A. I believe it was forty-three days."

The respondent produced no other evidence as to the *value of his services and expenditures to the appellant.* He was bound to produce such evidence in order to establish his right to recover against the appellant. See Williston, Contracts, Sec. 1482 (1937).

Mr. Sumter testified that the *value of the commitment* to the appellant was not in excess of $4,800.00 (Tr. 268). It must be remembered that the respondent performed only part of the services that went into the work preliminary to obtaining the commitment (Tr. 215, 216).

The verdict of the jury in the amount of $11,067.46 was not based upon the evidence produced at the trial nor was it in accordance with the instructions of the court and was, therefore, clearly excessive. Under the most favorable interpretation of the respondent's own testimony he was not entitled to damages in excess of $4,300.00.

CONCLUSION

The appellants respectfully submit that the contentions which they have herein urged are fully substantiated by the record, and that the trial court committed error as pointed out in each of the appellants' Specification of Errors. Each of the error committed was prejudicial to the rights of these appellants. Again appellants submit that there is no substantial evidence to sustain the jury verdict. We therefore respectfully ask this court to reverse the judgment entered below.

Respectfully submitted,

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